STATE OF MICHIGAN

COURT OF APPEALS

STAR TICKETS, Plaintiff-Appellee,	UNPUBLISHED October 22, 2015
v	No. 322371 Oakland Circuit Court
CHUMASH CASINO RESORT, Defendant-Appellant.	LC No. 2014-138263-CB

Before: GLEICHER, P.J., and SAWYER and MURPHY, JJ.

GLEICHER, P.J. (*concurring in part and dissenting in part*).

I concur with the majority that the language of the contractual provision at issue is sufficiently clear to constitute a waiver of defendant's sovereign immunity. I further agree that the Tribe's Enterprise Ordinance (EO) permits a waiver of tribal sovereign immunity only if executed in writing by certain specifically identified authorized officers or agents, and that Leah Carrasco is not one of them. I respectfully disagree with the majority's conclusion that the Tribe waived its immunity by ratifying the agreement through its performance. In my view, this holding cannot be reconciled with a fundamental principle underlying sovereign immunity: a waiver of sovereign immunity cannot be implied, but must be unequivocally expressed. *United States v Mitchell*, 445 US 535, 538; 100 S Ct 1349; 63 L Ed 2d 607 (1980).

Indian tribes possess the inherent immunity from suit "traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v Martinez*, 436 US 49, 58; 98 S Ct 1670; 56 L Ed 2d 106 (1978). A tribe's immunity extends to civil suits based on breach of contract arising from a tribe's commercial activities. *Kiowa Tribe of Oklahoma v Mrg Technologies, Inc*, 523 US 751, 760; 118 S Ct 1700; 140 L Ed 2d 981 (1998). The United States Supreme Court recently underscored the depth and breadth of that immunity in *Michigan v Bay Mills Indian Community*, 572 US __; 134 S Ct 2024; 188 L Ed 2d 1071 (2014). Immunity from suit represents a "core aspect[] of sovereignty" and "is a necessary corollary to Indian sovereignty and self-governance," the Supreme Court explained. *Id* at 2030 (quotation marks and citations omitted). Quoting *The Federalist No. 81* (Alexander Hamilton), the Court pointedly observed: "It is inherent in the nature of sovereignty not to be amenable to suit without consent." *Id*. (quotation marks omitted).

That said, tribes can expressly waive their sovereign immunity. By proposing, drafting, and entering into an arbitration agreement, the Citizen Potawatomi Nation Tribe did just that as discussed in *C & L Enterprises, Inc v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532

US 411, 422; 121 S Ct 1589; 149 L Ed 2d 623 (2001). However, the United States Supreme Court has applied the stringent rules governing less-than-explicit waivers of sovereign immunity quoted above to Indian tribes: "It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' " *Santa Clara Pueblo*, 436 US at 58 (citation omitted). "Without regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." *Merrion v Jicarilla Apache Tribe*, 455 US 130, 148; 102 S Ct 894; 71 L Ed 2d 21 (1982). "Consent alone gives jurisdiction to adjudge against a sovereign." *United States v United States Fidelity & Guaranty Co*, 309 US 506, 514; 60 S Ct 653; 84 L Ed 894 (1940).

A tribe "expresses" a legally enforceable waiver of its sovereignty according to its own rules. To hold otherwise would interfere with a tribe's inherent power of self-governance. These interrelated concepts have deep roots:

> It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, *it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted,* and may withdraw its consent whenever it may suppose that justice to the public requires it. [*Beers v Arkansas*, 61 US 527, 529; 15 L Ed 991 (1857) (emphasis added).]

See also *McNair v State*, 305 Mich 181, 187; 9 NW2d 52 (1943) (if the defense of sovereign immunity "can only be waived by legislative action, then it necessarily follows that the attorney general, an officer of the State of Michigan, may not waive such defense"). Application of these precepts to the facts at hand convinces me that *only* defendant's Enterprise Board can waive defendant's sovereign immunity, and that nothing short of an express waiver approved by the Board satisfies the law.

Unlike the majority, I find *Memphis Biofuels, LLC v Chickasaw Nation Indus, Inc*, 585 F3d 917, 922 (CA 6, 2009), persuasive. In that case, the Court of Appeals for the Sixth Circuit held that "unauthorized acts of tribal officials are insufficient to waive tribal-sovereign immunity." *Id*. at 922.[1] This represents the majority view. Keith, Comment, *Who Should Pay*

[1] I respectfully disagree with the majority's implication that we are bound by obiter dictum regarding *Memphis Biofuels* in *Bates Assoc, LLC v 132 Assoc, LLC*, 290 Mich App 52; 799 NW2d 177 (2010). Throughout the litigation in *Bates*, the tribe conceded that it had waived its tribal immunity even though no specific resolution pertaining to a waiver had been passed by the tribe. The tribe advanced an opposite position in a motion for reconsideration and on appeal. *Id*. at 63. Accordingly, *Bates* is fully distinguishable from this case. Furthermore, the *Bates* panel explicitly distinguished the facts of that case from *Memphis Biofuels*. *Id*. at 62-63. That *Bates*

for the Errors of the Tribal Agent?: Why Courts Should Enforce Contractual Waivers of Tribal Immunity When an Agent Exceeds Her Authority Under Tribal Law, 14 U Pa J Bus L 843, 847 (2012). The Sixth Circuit opined, "This result may seem unfair, but that is the reality of sovereign immunity[.]" *Memphis Biofuels*, 585 F3d at 922. But on the other hand,

> Indian tribes long have structured their many commercial dealings upon the justified expectation that absent an express waiver their sovereign immunity stood fast. Relaxation of the settled standard invites challenge to virtually every activity undertaken by a tribe on the basis that the tribal immunity had been implicitly waived. [*American Indian Agricultural Credit Consortium, Inc v Standing Rock Sioux Tribe*, 780 F2d 1374, 1378 (CA 8, 1985).]

Santa Clara Pueblo firmly instructs that sovereign immunity cannot be waived by implication. Accordingly, equitable doctrines and judge-made rules such as ratification may not be employed to abrogate a sovereign's prerogative to determine how it will express a waiver of its immunity, as that power resides solely with the sovereign. Pursuant to the EO, only the tribe's Enterprise Board may ratify a contractual waiver of immunity. I would reverse the trial court and enter judgment in favor of defendant.

/s/ Elizabeth L. Gleicher

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rejected the application of *Memphis Biofuels* under entirely different factual circumstances has no bearing on this panel's ability to adopt the Sixth Circuit's approach.